SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1967

No. 549

HERMAN SIEGELSON,

Petitioner,

v.

THE STATE OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Question Presented

Whether petitioner's rights to due process, effective counsel, or confrontation were violated when the sentencing justice requested and thereafter held a conference with a prosecuting attorney relative to sentence in the absence of petitioner and his lawyer?

Statement of the Case

Petitioner was indicted, on an indictment filed July 2, 1965, by a New York County Grand Jury charging three counts of CRIMINALLY SELLING ARTIFICIALLY COLORED DIAMONDS (N.Y. Penal Law §452) and three counts of GRAND LARCENY (N.Y. Penal Law §1290). The acts charged in the indictment included the sale of a $2,000 tinted diamond to a police undercover agent for $4,250 (59).* The audacity of petitioner was confirmed when the diamond sold to the undercover agent was boiled in acid by the police to remove the tint and returned to petitioner on the grounds that it had faded (59). Petitioner with no difficulty retinted the stone and returned it the next day (59). Police seized 270 gems at the time of his arrest; the stones were analyzed and in the opinion of the Gemological Institute of America were tinted (20-1).

On July 23, 1965, petitioner pleaded guilty to three misdemeanor counts of selling artificially colored diamonds, punishable by a maximum of one year and/or $500 maximum fine on each count (N. Y. Penal Law §1937) (10-13). On October 11, 1965, petitioner was arraigned for sentencing. In response to a defense contention that incarceration would close petitioner's business and put four families out of work, the court stated:

> "I am not doing anything. I am not putting anybody out of work. I am not closing anybody's business. And I am only here as a Judge, to try to do what is right. And I strangled myself in this case;

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*References are to the pages of the printed Appellate Division Record on Appeal.

> and I had the District Attorney in, and I argued with him for forty-five minutes. And I had the Probation Department in, and I'm trying to do whatever is possible to help him, because I'm a pretty decent, humane individual. So don't throw the onus upon me as being an individual that's putting anybody out of business, or destroying families * * *'' (22).

Petitioner was sentenced to three months' imprisonment on one count, and a fine of $500 on each of the two other counts (15, 25).

Thereafter by motion, petitioner moved the trial court for a suspension of the jail sentence imposed, submitting letters and affidavits from employees, friends, and physicians. Finally, on December 6, 1965, the trial court modified the earlier sentence by reducing the length of incarceration to two months (66-7).

Having made no objection to the sentencing court as to the sentencing procedure employed, petitioner appealed to the Appellate Division, attacking the "excessiveness" of the sentence. Petitioner first raised the constitutional issues urged here in the Court of Appeals. That court rejected those claims [*People* v. *Siegelson,* 19 N.Y. 2d 889, 19 N.Y. 2d 1018 (motion to amend remittitur granted)].

ARGUMENT

The *ex parte* conference between the judge and prosecutor prior to sentencing did not violate petitioner's rights under the Fourteenth or Sixth Amendments to the United States Constitution [answering Petitioner's Brief].

a. The record does not support petitioner's factual allegations.

On October 11, 1965, the trial court heard arguments from petitioner's counsel and an assistant district attorney on the question of sentence. During that argument and in response to defense counsel's urgent appeal that incarceration would close petitioner's business and put four families out of work, the sentencing court, in a short statement revealing its sensitivity to the importance of the decision before it, mentioned that it had argued with an assistant district attorney in chambers about sentence for forty-five minutes (22). Thereafter, the court sentenced the defendant to two months in prison and fined him one thousand dollars (15, 25, 66-7).

From these facts petitioner draws the indefensible conclusion that the sentencing justice was "pressured" into incarcerating the defendant, that the sentencing justice lost his "judicial objectivity," and that the actual sentencing hearing was a "mere formality" (brief, pp. 4, 5). These conclusions are mere surmise. The record shows little as to what went on in chambers. The record does not tell what was urged on the judge. And we certainly may not conclude that whatever occurred had the inexorable psychological effect on the judge that is claimed here.

Further, the petitioner's unsupported claim of the effect of the *ex parte* conference should not obscure facts demonstrating the harmlessness of that interview. First, the sentence imposed for three counts, carrying a maximum three years imprisonment and/or $1,500 fine, was only two months and $1,000. Second, this conference in no way foreclosed defense counsel from arguing his client's case and reinforcing that argument with affidavits and letters which ultimately convinced the sentencing court to lower petitioner's prison term from three to two months. Third, it was the sentencing judge who summoned the district attorney to the conference. Fourth, there is no showing that the district attorney at that conference urged a position different from what he urged at the sentencing proceedings in open court. Finally, although afforded ample opportunity to object by the court's disclosure of this conference prior to actual sentencing, petitioner raised this question neither before the sentencing court nor before the intermediate appellate court.

b. Petitioner was not denied the right to confront witnesses against him.

Petitioner contends that the *ex parte* argument of the district attorney in chambers in the absence of defense counsel was in effect a denial of petitioner's right to confront and cross-examine witnesses, and rebut evidence against him. This in effect must mean that petitioner was denied the right to rebut the district attorney's sentencing position.

But that is just not the case here. The district attorney made his sentencing position quite clear at the initial

sentencing hearing. And petitioner's counsel does not deny that he had ample time and opportunity to counter that position. The record indicates that not only did he do so at the initial hearing, but in the weeks that followed he continued to reinforce that argument by letters and affidavits from friends and employees of petitioner.

Further, the procedural and evidentiary rules governing sentencing proceedings are not and ought not to be the same as those governing trial proceedings. The acknowledged aim of sentence procedures is to select from the available battery of rehabilitative and deterrent techniques those which will most likely affect the reformation of the particular offender and deter him from future criminal activity. This selection can only be intelligently made if the sentencing tribunal has before it as much information as it can gather about the particular offender. This information must come from many different quarters, from family, friends, and acquaintances of a defendant, from schools, probation officers and employers and from prosecutors and law enforcement agencies.

And it must come in the form of affidavit and epistle. This process of evidentiary submission ought not be restricted by "hearsay" rules. Nor ought the sources of the information be subjected to cross-examination in formal proceedings. To do so would not only occasion inordinate delay but also would cause informants, who desired their information to be confidential, to withhold that information. Ultimately, it would arrest the flow of information. And this primarily to the detriment of the individual accused. For, except in the case of multiple offenders, in-

formation about the background of the offender more often than not tempers punishment.

In *Williams* v. *New York*, 337 U. S. 241 (1949), this Court sustained the validity of this modern approach to sentencing procedure. Specifically *Williams* upheld the use by a court, in determining sentence, of information supplied by a prosecutorial agency *ex parte* that a defendant had participated in 30 burglaries for which he had not been convicted. Assuming that the "due process" clause of the Fourteenth Amendment, applicable to state criminal proceedings, guaranteed an accused's right to cross-examination of witnesses against him, Mr. Justice Black, speaking for this Court, held that that right, although applicable to the guilt stage of criminal proceedings, was not applicable to the punishment stage.

Williams thus upheld in the face of a constitutional attack, raising Sixth as well as Fourteenth Amendment questions, the sentencing practice of receiving *ex parte* information the source of which is not subject to cross-examination in open court. And it specifically upheld the use of such information from a prosecutorial organ of the state.

In the instant case, the sentencing court, apparently in an effort to gain either additional information or an added perspective on the difficult decision before it, "had the District Attorney in" (22). It also consulted a representative of the Probation Department, a fact which, in petitioner's view, apparently raises no constitutional issues. Thus, petitioner's argument that the prosecutor's access to the sentencing judge *ex parte* violates his due process right to confrontation of witnesses against him fails because that right does not guarantee him the privilege of cross-

examining the sources of sentencing information [cf. *People* v. *Peace,* 18 N.Y.2d 230 (1966), *cert. denied,* 385 U. S. 1032].

c. Petitioner was not denied the right to effective counsel.

Petitioner claims that the *ex parte* conference deprived him of "the right to counsel" at a "critical stage" of the proceedings against him. This claim is based on the dubious inference that because there was an *ex parte* conference and there was a two month jail sentence the sentencing hearing actually took place in chambers where petitioner was not represented.

The fact that petitioner's counsel was allowed time to argue his client's case and submit affidavits and letters from employees, associates and even petitioner's parent's physician, certainly belies any contention that petitioner was denied effective counsel at the sentencing proceeding; petitioner "* * * had counsel in ample time to take advantage of every defense which could have been available to him originally." [*Canizio* v. *New York,* 327 U. S. 82, 86 (1946).] And the reduction of the jail term from three to two months by the same judge who held the conference certainly negatives the contention that the sentence in this case was decided at that *ex parte* conference.

In short, that *ex parte* conference did not render petitioner's right to counsel a hollow right. It did not determine the outcome of the proceeding so inexorably as to render petitioner's counsel ineffective. Thus it was not a "critical stage" in the particular sense in which that phrase has come to be used in recent decisions of this

Court [*Stovall* v. *Denno*, 386 U. S. —— (1967); *Escobedo* v. *Illinois*, 378 U. S. 478 (1964)].

Further, this right to counsel argument is very similar to if not identical with petitioner's right to confrontation argument. It is so close in fact that this Court, in passing on the similar confrontation problems raised in *Williams* v. *New York, supra,* thought it necessary to remark in a footnote:

> "Other due process requirements mentioned in the *Oliver* case were that the defendant should be permitted to offer evidence in his own behalf and be represented by counsel. Appellant, however, was represented by counsel both when tried and sentenced, and the sentencing judge did not decline to permit introduction of any evidence" [*id.* at 245 n. 3].

Thus *Williams* reinforces the position that petitioner was not denied the right to counsel.

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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